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No. 87-831

In the Supreme Court of the United States

OCTOBER TERM, 1987

CASEY E. ABEYTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a defendant has the right to introduce the results of an ex parte polygraph examination to bolster his alibi defense even when the defendant does not testify on his own behalf at trial.

1. Petitioner, a member of the United States Army, was convicted by a general court-martial at Schweinfurt, West Germany, of the wrongful distribution of marijuana in hashish form, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. (Supp. IV) 912a. He was sentenced to confinement for four months, forfeiture of part of his pay, a reduction to the lowest enlisted grade, and a bad conduct discharge. The convening authority approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 4a-5a). The Court of Military Appeals affirmed (*id.* at 1a-3a).

a. The evidence showed that petitioner distributed 9.27 grams of marijuana in hashish form on or about January 31, 1985, at Ledward Barracks in Schweinfurt, Germany. The government's evidence consisted of the

testimony of Specialist Tracy Steele, a military police officer who was working undercover as a member of the Drug Suppression Team of the Criminal Investigation Division (Tr. 15-44), and petitioner's sworn confession, in which he admitted selling $150 worth of hashish in January 1985 (GX 6; Tr. 49). In his confession, petitioner admitted that at the end of that month he was introduced to a white male, known to him only as "T," who was interested in buying hashish. Petitioner sold "T" hashish for $150. At trial, Steele identified petitioner (Tr. 16). He also testified that he purchased hashish from petitioner on the night in question and paid petitioner with three $50 bills (Tr. 16-20).

b. Petitioner did not testify at trial. Instead, he offered evidence through other witnesses that he was in Frankfurt, not Schweinfurt, at the time of the drug sale. Specialist Charles Wolfe, petitioner's co-worker, testified that he and petitioner left Schweinfurt for Frankfurt at approximately noon and did not return until February 1, 1985 (Tr. 153-154). Other witnesses provided circumstantial corroboration of petitioner's and Wolfe's travel plans, but they could not confirm petitioner's absence from Schweinfurt or his presence in Frankfurt (Tr. 180, 199).

Following a lengthy evidentiary hearing (Tr. 70-142), petitioner proffered the testimony of Dr. Udo Undeutsch, an expert in the field of polygraphy, in order to show that his confession to the crime was false (Tr. 145-146). According to the proffer, Dr. Undeutsch would have given the opinion that petitioner answered truthfully three questions relevant to the charge against him (Tr. 137).[1] The trial judge excluded the testimony (Tr. 146-147).[2]

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[1] The questions were: "on 31st of January 1985, was there any amount of hashish in your possession?"; "on 31st of January 1985, did you sell a chunk of hashish to someone?"; and "on the 31st of January 1985, did you receive three 50 dollar bills from someone?" (Tr. 135-136). See DX K.

[2] The trial judge ruled that petitioner had failed to establish the reliability of the testing procedure under *Frye* v. *United States*, 293

c. The Court of Military Appeals affirmed (Pet. App. 1a-3a). The court concluded that a polygraph examiner's opinion whether the subject was truthful or deceptive at the time of the examination is relevant only to the question whether the subject was being truthful in his testimony at trial. When the subject does not testify at trial, however, the trier of fact cannot draw that inference from the results of the polygraph examination, and those test results are therefore not probative. *Id.* at 2a-3a. The court thus found that the evidence was inadmissible under its earlier decision in *United States* v. *Gipson*, 24 M.J. 246 (C.M.A. 1987), which ruled that a trial judge enjoys broad discretion to admit or exclude polygraph evidence (Pet. App. 2a-3a).[3]

2. a. No federal court of appeals has ruled that a defendant has the right to introduce polygraph results. In many of the circuits, polygraph evidence is inadmissible per se.[4] Some courts have ruled that such evidence is in-

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F. 1013 (D.C. Cir. 1923), and *United States* v. *Bothwell*, 17 M.J. 684 (A.C.M.R. 1983). Petitioner conceded at trial that the trial judge's decision to admit the expert's testimony was "totally discretionary" (Tr. 143).

[3] In *Gipson*, the Court of Military Appeals abandoned the *Frye* test for the admission of scientific evidence in favor of a more lenient test under Mil. R. Evid. 401, 403, and 702. 24 M.J. at 250-252. The Court of Military Appeals also reconsidered its longstanding rule that polygraph test results are per se inadmissible (see *United States* v. *Ledlow*, 11 C.M.A. 659, 29 C.M.R. 475 (1960)) in light of that new standard and concluded that a trial judge has the discretion to admit polygraph evidence. 24 M.J. at 256.

In this case, the Court of Military Appeals analyzed petitioner's proffer in accordance with the standards enunciated in *Gipson* and found that the evidence was properly excluded (Pet. App. 3a). Accordingly, since petitioner received the benefit of a more favorable standard of review for the admission of polygraph evidence than would apply under *Frye*, there is no need in this case to consider which standard should be applied.

[4] See, *e.g.*, *United States* v. *Soundingsides*, 820 F.2d 1232, 1241-1242 (10th Cir. 1987); *United States* v. *Tedder*, 801 F.2d 1437,

admissible in the absence of a stipulation by the parties.[5] Other courts have held that the trial judge has discretion to admit such evidence once the proponent has established its reliability.[6] No court of appeals, however, has treated such evidence more favorably than the Court of Military Appeals. Accordingly, because the polygraph examiner's testimony was found inadmissible under the *Gipson* standard, petitioner would not have obtained a favorable ruling under the standard applied by any other federal court of appeals.

b. The decision below is also correct. Petitioner claims (Pet. 3-7) that he was denied a fair trial by the exclusion of

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1444 (4th Cir. 1986), cert. denied, No. 86-6287 (Mar. 23, 1987); *United States* v. *Russo*, 796 F.2d 1443, 1453 (11th Cir. 1986); *Barrel of Fun, Inc.* v. *State Farm Fire & Casualty Co.*, 739 F.2d 1028, 1031 (5th Cir. 1984); *United States* v. *Holman*, 680 F.2d 1340, 1352 (11th Cir. 1982); *United States* v. *Skeens*, 494 F.2d 1050, 1053 (D.C. Cir. 1974); see also *United States* v. *Bando*, 244 F.2d 833, 841 (2d Cir.), cert. denied, 355 U.S. 844 (1957). Compare *Rothgeb* v. *United States*, 789 F.2d 647, 651 (8th Cir. 1986) (although results of a polygraph are not admissible, the responses to questions asked and evidence of defendant's demeanor during a polygraph examination may be admissible).

[5] See, *e.g.*, *Brown* v. *Darcy*, 783 F.2d 1389, 1391 (9th Cir. 1986); *United States* v. *Beck*, 729 F.2d 1329, 1332 (11th Cir.), cert. denied, 469 U.S. 981 (1984); *United States* v. *Oliver*, 525 F.2d 731, 736-737 (8th Cir. 1975), cert. denied, 424 U.S. 973 (1976); see also *Wolfel* v. *Holbrook*, 823 F.2d 970, 974 (6th Cir. 1987) (polygraph evidence is generally inadmissible in the absence of a stipulation, but noting that there may be cases where admission would not be error).

[6] *United States* v. *Tucker*, 773 F.2d 136, 141 (7th Cir. 1985), cert. denied, No. 85-976 (July 7, 1986) (no abuse of discretion where defendant did not stipulate beforehand that the polygraph results would be admissible, whatever they may be); *United States* v. *Williams*, 737 F.2d 594, 611 (7th Cir. 1984), cert. denied, 470 U.S. 1003 (1985); *United States* v. *Falsia*, 724 F.2d 1339, 1341-1342 (9th Cir. 1983); *de Vries* v. *St. Paul Fire & Marine Ins. Co.*, 716 F.2d 939, 944-945 (1st Cir. 1983).

the polygraph examiner's testimony.[7] That claim lacks merit. The trial judge's ruling did not prevent petitioner from offering a defense, as shown by the fact that petitioner presented five witnesses to support his alibi defense. Petitioner was also free to testify at trial in his own defense, but he decided not to do so. That choice does not give him a right under the Sixth Amendment to introduce irrelevant evidence. *United States* v. *Gipson*, 24 M.J. at 252.

Petitioner's proffer of the polygraph examiner's testimony was, at bottom, an attempt to testify without being subjected to cross-examination by the government. The Sixth Amendment does not give the defendant any such right. See *United States* v. *Nobles*, 422 U.S. 225, 241 (1975) ("The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth."). Except to the extent that it bears on the defendant's credibility—an issue that ordinarily is not in the case if the defendant does not testify—polygraph evidence is the worst form of hearsay. It consists simply of the defendant's out-of-court statement of his version of the events, presented through a witness who adds that, in his opinion, the defendant was telling the truth. If a defendant seeks to present his version of the

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[7] Petitioner also contends that he was denied the right to compulsory process, but he did not rely on the Sixth Amendment at trial or in either military appellate court and therefore may not do so for the first time before this Court. See, *e.g.*, *Solorio* v. *United States*, No. 85-1581 (June 25, 1987), slip op. 15 n.18; *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event petitioner's claim lacks merit. Two courts of appeals have ruled that a defendant has no constitutional right to introduce the results of a polygraph examination. *United States* v. *Gordon*, 688 F.2d 42, 44-45 (8th Cir. 1982); *Jackson* v. *Garrison*, 677 F.2d 371, 373 (4th Cir.), cert. denied, 454 U.S. 1036 (1981). Petitioner has cited no contrary authority.

facts through the testimony of a polygraph examiner, but does not testify himself, it is a fair inference that the defendant wishes to present his story under circumstances suggesting that his version is credible, while at the same time avoiding any risk of exposing his credibility to challenge through cross-examination. A trial court can properly refuse to permit the manipulation of the trial system in that fashion.

In addition, petitioner did not stipulate beforehand that the results of the polygraph examination would be admissible whatever they may be, a procedure that is sanctioned or required by some courts of appeals.[8] That approach is based on a distrust of ex parte polygraphs, on the ground that the polygraph measures nervousness, and the ability to discard unfavorable test results eliminates or reduces the nervousness caused by the fear of detection.[9] In these circumstances, the Court of Military Appeals was correct in holding that the trial judge did not abuse his discretion by excluding petitioner's polygraph evidence.

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[8] See, *e.g.*, *Wolfel* v. *Holbrook*, 823 F.2d at 974; *Brown* v. *Darcy*, 783 F.2d at 1391; *United States* v. *Tucker*, 773 F.2d at 141.

[9] *United States* v. *Tucker*, 773 F.2d at 141; *United States* v. *Williams*, 737 F.2d at 611; see *United States* v. *Gipson*, 24 M.J. at 249.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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